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No. 62

In the

Supreme Court of the United States

October Term 1965

ROBERT J. JOBE and WILLIAM B. FARNEY,
Appellants,

vs.

CITY OF ERLANGER,
Appellee.

JURISDICTIONAL STATEMENT

JAMES C. WARE, for
WARE, BRYSON and NOLAN,
Attorneys for Appellants,
507 First Natl. Bank Bldg.,
Covington, Kentucky.

Copy of this JURISDICTIONAL STATEMENT was served upon Harry L. Riggs, Attorney for Appellee, 25 Erlanger Road, Erlanger, Kentucky, this 4 day of March, 1965.

James C. Ware

James C. Ware,
Of Counsel for Appellants.

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JURISDICTIONAL STATEMENT

1. (a) The within matter is reported officially in 383 SW (2nd) 675, Ky., decided May 8th, 1964; re-hearing denied December 4th, 1964..

(b) (i) The nature of these proceedings involves the constitutionality of Kentucky Revised Statute 81.190 (4) expressly providing that there shall be no appeal from the Judgment of the Circuit Court in annexation proceedings involving third-class cities.

(ii) The Judgment herein appealed from is the Judgment of the Court of Appeals of Kentucky, rendered and entered of record on May 8th, 1964. On December 4th, 1964, the Court of Appeals of Kentucky entered an Order denying the Petition for Re-hearing filed by the Appellant herein and affirming its Original Judgment. The Notice of Appeal to the United States Supreme Court was filed by the Appellant herein in the Court of Appeals of Kentucky on December 22nd, 1964, and filed of record on December 28th, 1964.

(iii) The statutory provision believed to confer jurisdiction on this Court is the fact that Kentucky Revised

Statute 81.190 (4) expressly provides that there shall be no appeal from the Judgment of the Circuit Court in Annexation Proceedings involving third-class cities. It is further pointed out that there is a similar denial of an appeal in the Statute relating to Annexation by fifth-class cities. Appeals are permitted in similar cases involving cities of the other four classes. There is no valid basis for saying that appeals shall be permitted in second- and fourth-class city annexation cases and that an appeal shall be denied in a third-class city; since cities are classified solely on the basis of population pursuant to Kentucky Constitution, Section 156. To draw such a distinction between third- and fifth-class cities as opposed to other class cities is a denial of the equal protection of the law in violation of the equal protection clause of the Federal Constitution. which protection is as set forth in the Fourteenth Amendment of the United States Constitution, which expressly forbids a State to deny to any person within its jurisdiction equal protection of the laws. The Fourteenth Amendment is a guarantee that all persons subjected to State Legislation shall be treated alike, under like circumstances and conditions, both in privileges conferred and in liabilities opposed. 16A C.J.S., Constitutional Law, Section 502, pages 296 and 297.

(iv) *U. S. ex rel. Brown* v. *Smith,* D.C. Vt. 1962, 200 Federal Supplement 885, 306 F. (2nd) 596, 83 S. Ct. 1012, 372 U.S. 959, 10 L.Ed. (2nd) 11. *Legates* v. *Heverin,* Del. Super 1962, 196 A. (2nd) 403. *State* v. *Janiec,* 1951, 80 A. (2nd) 94, 6 N.J. 608, 71 S. Ct. 1007, 341 U.S. 955, 95 L.Ed. 1376. *People ex rel. Powott Corporation* v. *Woodworth,* 1939, 15 N.Y.S. (2nd) 985, 172 Misc. 791. *Hernandez* v. *State of Texas,* Tex. 1954, 74 S. Ct. 667, 347 U.S. 475, 98 L.Ed. 866. *City of Louisville* v. *Klusmeyer,* Ky. 1959, 324 SW (2nd) 831. *State* v. *Pirkey,* 1959, 281 P. (2nd) 698, 203 OR. 697. *H. P. Welch Co.* v. *State,*

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(v) Kentucky Revised Statute 81.190:

"Any city of the third-class may annex any territory to the city or reduce the boundaries of the city, in the same manner and under the same procedure as is provided in KRS 81.100 and 81.110 for annexation of unincorporated territory or reduction of boundaries by cities of the first-class, with the following exceptions:

(4) There shall be no appeal from the Judgment of a Circuit Court."

Kentucky Revised Statute 81.230:

"Any city of the fifth-class may annex any territory to the city or reduce the boundaries of the city, in the same manner and under the same procedure as is provided in KRS 81.100 and 81.110 for annexation of unincorporated territory or reduction of boundaries by cities of the first-class, with the following exceptions:

(3) There shall be no appeal from the Judgment of the Circuit Court."

Kentucky Revised Statute 81.110:

"Protest against annexation of unincorporated territory or reduction of territory by first-class cities:

(3) An appeal from the Judgment may be taken as in other cases, but there shall be no change of venue from the county. Costs shall follow the Judgment."

Kentucky Revised Statute 81.140:

"Annexation of unincorporated territory or reduction of territory by second-class cities.
(There is no denial of the right of appeal.")

Kentucky Revised Statute 81.210:

"Annexation or reduction of territory by fourth-class cities.
(There is no denial of the right of appeal.")

Kentucky Revised Statute 81.240:

"Annexation or reduction of territory by sixth-class cities.
(There is no denial of the right of appeal.")

The Statutes herein quoted are as appear in Baldwin's Revised Statutes Service, "Kentucky Revised Statutes Annotated," as appear on pages 154 through 159 of said edition.

(c) (i) The primary question presented by this appeal is the fact that in cases of proposed annexation by cities of the first-, second-, fourth-, and sixth-class, the right of appeal to the Court of Appeals of Kentucky, (which is the highest Appeals Court in this State) is granted; however, the right of appeal is denied in annexation matters involving proposed annexations by cities of the third-class and the fifth-class. The instant matter involves the City of Erlanger, which is a city of the third-class.

It has previously been decided both in this State and elsewhere, that the denial of the right of appeal in a given matter is not in and of itself a denial of a person's constitutional rights, so long as the denial of the appeal as to a given subject matter is denied to all persons within the jurisdiction of the State, but not granted to some and denied to others; except that such distinction and differ-

entiation be based on some sound reason for drawing the distinction. Further, it has been previously decided, both in the State of Kentucky and also in the United States Supreme Court, that a State may devise various classifications, based on population or other reasons, without violating the United States Constitution, particularly the Fourteenth Amendment thereto, so long as the classifications, themselves, are based upon reasonable distinctions and such classifications are not made arbitrarily and capriciously.

However, as pointed out in the dissenting opinion of Judge Montgomery, the denial of an appeal in third-class city annexation cases is a denial of the equal protection of the law afforded by the Fourteenth Amendment to the United States Constitution, in that the Fourteenth Amendment is a guarantee that all persons subjected to State Legislation shall be treated alike, under like circumstances and conditions, both in privileges conferred and in liabilities opposed. As further pointed out by Judge Montgomery:

> "There is no valid basis for saying that appeal shall be permitted in second- and fourth-class city annexation cases and that an appeal shall be denied in a third-class city. Cities are classified on the sole basis of population. Kentucky Constitution, Section 156. Express provision therein is made for the change of classification as its population may increase or decrease. Such differences in population cannot be made the basis for denying the freeholders of territory contiguous to a city the right to appeal in an annexation proceeding. *There is no reasonable relationship between population and appeal.* (Emphasis ours). There is no difference in circumstances or condition between freeholders of territory contiguous to second-, third,- and fourth-class cities, except a difference in population of the respective cities. It is possible that the popula-

> tion may be the same or substantially so in cities of different classes."
>
> "The inevitable conclusion is that the statute which denies an appeal in this case is a denial of the equal protection of the law under the Federal Constitution

Therefore, the appeal of this matter shall be limited to the Fourteenth Amendment, as the same has to do with the equal protection of the laws provided thereby and shall not involve any other United States Constitutional question, except to the extent that "the due process clause" of the Federal Constitution is inter-related with the question of equal protection.

(d). A concise statement of the case containing the facts material to the consideration of the questions presented is that indicated in Paragraph (c) above. The Federal question herein sought to be reviewed was first raised upon the initial filing of these proceedings, the "protest against annexation of unincorporated territory lying adjacent to and contiguous with the generally easterly boundary of the City of Erlanger, Kentucky," which is found on pages 3 through 11 of the transcript of record filed herein, particularly the following language as it appears in Paragraph (5) thereof on page 6 of the transcript, to-wit:

> "Plaintiffs further state that Section 81.190, Kentucky Revised Statutes, is unconstitutional in that it provides in sub-section (4): 'There shall be no appeal from the Judgment of the Circuit Court', and said sub-section violates Section 59 of the Constitution of Kentucky, which provides that the General Assembly shall not pass local or special acts in any case where a general law can be made applicable; and the provision of said sub-section denies to the plaintiffs herein the equal protection of the law in violation of Section (1) of the Fourteenth Amendment of the Constitution of the United States."

The Federal question also appears on page 16 of the transcript of record (3) of the stipulations filed herein as follows:

> "That aside from the constitutionality of KRS 81.190 raised in Paragraph (5) of plaintiff's Protest against Annexation, the only issue to be tried by this Court is whether failure to annex will materially retard the prosperity of the city, and of the owners and inhabitants of the territory sought to be annexed."

The Federal question is next presented on page 22 of the transcript of record as a part of the Judgment of the Kenton Circuit Court entered herein with specific reference to the following language as it appears on page 22:

> Plaintiff raises the question of constitutionality of KRS 81.190 (4) wherein, "There shall be no appeal from the Judgment."

The Federal question is next presented in Brief for Appellants, filed herein on August 14th, 1962, which apparently was not forwarded with the transcript of proceedings, but which is attached hereto as an appendix. The Federal question appears on pages 2, 3 and 4 of the Brief for Appellants. The Federal question was next presented in appellant's Petition for Re-Hearing, which appears on page 168 of the transcript of the record herein.

The rulings of the involved Courts as to the Federal question will be found in the record at the following places:

1. The Judgment of the Kenton Circuit Court, pages 23 to 26 of the record.
2. The decision of the Court of Appeals as appears on pages 161 to 163 of the transcript of record.
3. The Order of the Court of Appeals overruling the Petition for Re-Hearing as appears on page 170 of the transcript of record.

(e) Appellant believes strongly that the Kentucky Statute under which this territory is proposed to be annexed is unconstitutional and that the United States Supreme Court will so rule by reason of the obvious and patent lack of a reasonable basis for denying the right of appeal in matters involving third-class cities and fifth-class cities and granting the right of appeal to others. However, appellant is vastly concerned that the Supreme Court of the United States might consider that the question is other than a substantial one; a question that is of interest only to a few hundred residents, an otherwise insignificant area of this vast country and thus, perhaps in the opinion of the United States Supreme Court, a question which is less than national in interest and less than national in importance.

As to this possible approach, appellant states that the question is as serious as the very serious question recently decided by the United States Supreme Court as to apportionment of legislative and senatorial districts based on population alone; in fact, it seems to appellant that the question is of a similar nature in that this State previously considered that its division into various legislative and senatorial districts was purely a political and therefore, purely a State question, not involving any Federal question. It seems as clear in this case as it does in the decision involving the apportionment of districts, that an individual's constitutional rights are considered matters of great importance by the United States Supreme Court and are not overlooked or shoved under the desk, purely by reason of the fact that they involve acts of a State legislature, rather than of the Congress of the United States.

Historically, it is seen that the Fourteenth Amendment was created and ratified primarily to protect against discrimination by reason of color or race. However, the United States Supreme Court has ruled on many occasions

that the Fourteenth Amendment in its application is not restricted to discrimination on the basis of color or creed, but is protection against discrimination, on any unreasonable basis, of an individual's or a class of individuals' constitutional rights.

While the instant case might not present the question as emphatically as might a question of real national interest, certainly there is involved in this matter a much greater and wider question and that is the right, if such right exists, of the State legislature to attempt merely geographically, or by capricious classification or alleged classification of population or people to deny to individuals, the most important rights which they hope to preserve and which they look to the United States Supreme Court, not infrequently, to preserve.

Certainly, the over-all question of annexation is a matter primarily of State interest, rather than of a Federal question. However, there are factual situations under the law of Kentucky which on the one hand entitle a city to annex, but which on the other hand, might be such facts as to deny to a city the right to annex an area, which is entirely of a character not subject to annexation. As in the instant matter, the question was before the Court as to whether a denial of annexation would materially retard the progress and prosperity of the City of Erlanger. Appellant feels that a review of these factual questions by the Kentucky Court of Appeals would result in a favorable finding on the part of said appellants; however, a review of the factual questions cannot even be presented by reason of the denial of appeal in this instance. In other words, appellants believe that the facts of this matter should be reviewed on appeal, the same as they would be if the annexation had been undertaken by cities of the first-, second-, fourth-, or sixth-class. On the other hand, perhaps on a review of the facts, under the law, of this situation, the Kentucky Court of

Appeals would disagree. In any event, appellants should be entitled, as are residents and freeholders of areas annexed by other class cities, to a thorough and proper review of all of such questions. To grant such review to some of its citizens and to deny it to others, is a clear denial by the Kentucky Legislature of constitutional rights under the Fourteenth Amendment of the United States Constitution; and this is true, unless it can be shown that to differentiate and to distinguish one class from another is on the basis of some rational distinction. Our Appeal to the Kentucky Court of Appeals and the dissenting opinion of Judge Montgomery both present to the majority of the Kentucky Court of Appeals a challenge to set forth any, and we emphasize "any" reasonable basis for drawing such a distinction. That the Court of Appeals of Kentucky has failed to indicate the reason for so distinguishing is clearly only that there is no difference and there can be none.

Appellants are entitled to an appeal to the Kentucky Court of Appeals of all questions, both of law and of fact, which right is granted to its fellow citizens, but denied to them.

Respectfully submitted,

.....

James C. Ware, for
WARE, BRYSON and NOLAN,
507 First National Bank Bldg.,
Covington, Kentucky.
Attorney for Appellants.

APPENDIX A

KENTON CIRCUIT COURT
C. L. & Eq. Division

No. 6670

ROBERT J. JOBE, ET AL,
Plaintiffs,

vs.

CITY OF ERLANGER,
Defendant.

FINDING OF FACTS; CONCLUSIONS OF LAW; AND JUDGMENT OF THE COURT

(Filed March 29, 1962.)

This matter came on for hearing and trial on the merits before the court without a jury on January 11, 1962, at Covington, Kentucky. Plaintiff was present through the City Co-ordinator, City Engineer and Mayor and represented by Harry L. Riggs, the City Attorney and Harry L. Riggs, Jr. The Plaintiffs, Robert J. Jobe and William B. Farney, were present and represented by James Nolan of Ware, Bryson and Nolan.

FINDING OF FACTS

Stipulations were entered into between the parties through their counsel, stipulating that, (1) more than seventy-five (75%) per cent of the freeholders in the area

proposed to be annexed, object to said annexation; (2) that the City ordinances proposing to annex said territory were properly passed and published according to law and that no objection will be made thereto by Plaintiff; and (3) that aside from the constitutional issue, the only issue to be tried by the court, is whether failure to annex will materially retard the prosperity of the City and of the owners and inhabitants of the area sought to be annexed.

The burden being upon the Defendant to go forward with proof, considerable evidence was introduced by it. The court finds that the Defendant, City of Erlanger, is a prosperous and progressive third class municipality surrounded on two sides by other municipal corporations and therefore unable to expand in these directions. Of the remaining two sides, the area to the north is extremely rough and not adaptable to annexation at this time. The only remaining territory is the subject of this action. The Court further finds that most of the utilities and improvements available in the area proposed to be annexed, are the direct result of the efforts of the Defendant. The sanitary sewer line which crosses this area, is the result of the contract entered into between the Defendant, and the Sanitation District No. 1 of Campbell and Kenton Counties. The expenses incurred in the construction of this line were born in part by the residents of the Defendant.

The territory along Stephenson Road and Turkeyfoot Road is served with a water main. The Stephenson Road water main is the result of negotiations between the Defendant and the Kenton County Water Commission No. 1 and the construction of the main along Turkeyfoot Road was favorably influenced by these negotiations. The court finds that the county or city zoning to be enjoyed by the inhabitants of this territory, will be the direct result of the present zoning regulations of the Defendant City to which this territory is contiguous.

The court further finds that the progress of the Defendant City, will be retarded and further expansion prevented if annexation does not take place. The Defendant has approximately two hundred (200) home sights remaining to be developed. At the present rate of development, one hundred (100) per year, these building areas will be exhausted in two years.

The court finds that the prosperity of the inhabitants of this territory will be materially retarded by failure to annex. Fire insurance rates will be reduced by reason of fire protection to be received from the Defendant. There will be substantial increase in land values by reason of being annexed to the Defendant. This territory will further enjoy improved winter road service and street lighting. All facilities of the Defendant City will be made available to the inhabitants of this territory.

CONCLUSION OF LAW

Plaintiff and Defendant submitted post-trial memorandums in support of their positions. Under the law as contained in KRS 81.110 and 81.190 this matter was tried before the court without jury. As agreed to by the parties through stipulations aforesaid, the only issue to be tried by this court is—

> KRS 81.110 (2) . . . the annexation or reduction shall not take place, unless the judge finds from the evidence that a failure to annex or strike off will materially retard the prosperity of the City and owners and inhabitants of the territory sought to be annexed . . . ."

The court finds as a matter of law that from the evidence failure to annex will materially retard the prosperity of

the City of Erlanger and of the owners of the territory sought to be annexed.

In the case of PARK ET AL v. CITY OF COVINGTON, 187 Ky. 311, (March 2, 1920) 218 S.W. 986, The Court of Appeals said:

> "It was further shown that the improvement of Twenty-seventh street, by the construction of a trunk sewer, the paving of the street with granite block, the construction of sidewalks, and the bringing of gas into that part of the City, would enhance the value of the property in that section, including the property in question, from 50 to 100 per cent. On the other hand, the failure to annex the territory, which would prevent these improvements from being made, would not only retard the enhancement in price of the property in question, but would retard the growth and prosperity of the city on the opposite side of the street, since that portion of the city would not be built up until the improvements were made. In addition to this, it was shown that the inhabitants of the territory in question enjoy the same benefits and protection from the city government that the inhabitants on the opposite side of the street now enjoy.
>
> In view of the foregoing evidence, we see no reason to disturb the finding of the chancellor. In our opinion, the evidence makes it clear that, if the annexation does not take place, the inhabitants of the surrounding territory will be denied many governmental privileges which they would otherwise enjoy, and that this will deter others from locating in that vicinity, thereby postponing the development of the surrounding territory and the territory in question, preventing its enhancement in price, and thus necessarily retarding the prosperity not only of the city, but of the owners and inhabitants of the territory sought to be annexed."

Further law applicable to this case is contained in S. S. LIKINS ET AL v. CITY OF CLARKSON (June 24, 1955) 280 S.W. (2nd) 491, the Court of Appeals stated:

> "The term 'retard prosperity' means to delay progress of the community as 'gauged by its attainments in the many fields affecting the welfare of its inhabitants and the owners of property comprising its territorial limits. Thus economic, religious, social, educational, safety, and sanitary conditions are factors to be taken into consideration in determining the prosperity of a community as a whole.' Loeffler v. City of Louisville, 308 Ky. 629, 215 S.W. (2d) 535, 536. In determining the question, the court views the situation as a whole — 'the city as an organized community and the suburban property as an unorganized community.' Masonic Widows and Orphans Home and Infirmary v. City of Louisville, 309 Ky. 532, 217 S.W. (2d) 815, 819. It is apparent that each case of annexation is to be decided according to its own peculiar conditions and facts."

Plaintiff raises the question of constitutionality of KRS 81.190 (4) wherein, ". . . there shall be no appeal from the judgment." The question of the constitutionality of KRS 81.190 has been upheld, YOUNT v. CITY OF FRANKFORT, 255 S.W. (2d) 632, (February 27, 1953) the Court of Appeals stated:

> "Furthermore, they cannot complain of the ruling of the court denying them default judgment since KRS 81.190 (4) provides there shall be no appeal from the judgment of the circuit court in annexation proceedings by a third class city. The power of the Legislature to deny the right to appeal has always been recognized. Section 110 Ky. Constitution; Mason v. Montgomery County Board of Education, 291 Ky. 654, 165 S.W. (2d) 346. However, we have written that where in the same case the constitutionality of an Act of the Legislature is raised, which is independent in its nature,

strictly judicial and one of great consequence, it would be considered on appeal. Engle v. Miller, 303, Ky. 731, 199 S.W. (2d) 123. While we cannot consider the merits of this case on appeal we can determine whether or not the ordinance proposing annexation was duly passed, as well as the constitutionality of KRS 81.190."

JUDGMENT OF THE COURT

The Court therefore orders and adjudges as follows:

(1) That the plaintiff's complain. and protest against annexation be, and the same is hereby dismissed and judgment awarded the Defendant;

(2) That the annexation by the City of Erlanger of the territory described in the complaint and in ordinance #1026 of the City of Erlanger is hereby approved and shall be final; said property to be annexed is described as follows:

Beginning at a point in the center of Stevenson Road in the present corporation line of the City of Erlanger as established by Ordinance 787, adopted November 4, 1952, and running thence:

1. N. 48° 30′ E. and along the present corporation line (also the dividing line between Gripshover and Prewitt), a distance of 1118 ft. more or less, to a point; thence,

2. S. 41° 30′ E. and along Prewitt's northeasterly boundary, a distance of 996.14 ft. to a point in the center line of Turkey Foot Road; thence,

3. S. 41° 30′ E. a distance of 352.33 ft., to a point, said point being located 250 ft. southeast of the center line of Turkey Foot Road as measured at right angles thereto; thence,

4. S. 3° 42′ W. parallel to and 250 ft. distant from Turkey Foot Road, a distance of 599.55 ft., to a point; thence,

5. S. 13° 20′ W. continuing parallel to and 250 ft. distant from Turkey Foot Road, a distance of 347.59 ft. to a point; thence,

6. S. 5° 20′ W. continuing parallel to and 250 ft. distant from Turkey Foot Road, a distance of 801.62 ft., to a point; thence,

7. S. 20° 25′ W. continuing parallel to and 250 ft. distant from Turkey Foot Road, a distance of 875.63 ft. to a point; thence,

8. S. 39° 49′ W. continuing parallel to and 250 ft. distant from Turkey Foot Road, a distance of 623.42 ft., to a point; thence,

9. S. 44° 51′ W. continuing parallel to and 250 ft. distant from Turkey Foot Road, a distance of 262.87 ft. to a point; thence,

10. S. 20° 41′ W. continuing parallel to and 250 ft. distant from Turkey Foot Road, a distance of 332.22 ft. to a point; thence,

11. S. 63° 26′ W. continuing parallel to and 250 ft. distant from Turkey Foot Road, a distance of 437.38 ft., to a point; thence,

12. N. 79° 54′ W. continuing parallel to and 250 ft. distant from Turkey Foot Road, a distance of 192.42 ft., to a point; thence,

13. N. 41° 30′ W., a distance of 402.48 ft. to a point in the center line of Turkey Foot Road; thence,

14. S. 78° 30′ W., leaving Turkey Foot Road and up to the center line of Bullock Pen Creek, a distance of 750 ft., more or less, to a point in the dividing line between David Ringo and George Kees; thence,

15. N. 26° 00′ W. and along the dividing line between David Ringo, George Kees and Robert Sellers, a distance of 1900 ft. more or less, to a point in the southeasterly line of George McHugh; thence,

16. N. 60° 00′ E. and along the dividing line between George McHugh and David Ringo, a distance of 780 ft. more or less to a point in the southwesterly line of James Mullins; thence,

17. N. 55° 00′ W. and along the dividing line between James Mullins and George McHugh a distance of 991 ft. more or less to a point in the southeasterly line of the old Wilkins tract; thence,

18. N. 48 ° 30′ E. and along the dividing line between James Mullins and The Wilkins tract a distance of 1320 ft. more or less to a point in the present corporation line of the City of Erlanger as established by Ordinance 787 adopted November 4, 1952; thence,

19. S. 40° 25′ E. and continuing along the present corporation line of the City of Erlanger a distance of 474 ft. to a point; thence,

20. N. 48° 30′ E. and continuing along the present corporation line of the City of Erlanger a distance of 920 ft. more or less to the place of beginning.

(3) That the cost of this action shall be assessed against the Plaintiffs.

/s/ RODNEY G. BRYSON
Judge, Kenton Circuit Court

APPENDIX B

COURT OF APPEALS OF KENTUCKY

ROBERT J. JOBE, ET AL.,
Appellants,

vs.

CITY OF ERLANGER,
Appellee.

Appeal From Kenton Circuit Court
Common Law and Equity Division
Honorable Rodney G. Bryson, Judge

OPINION OF THE COURT BY COMMISSIONER CULLEN
(Rendered May 8, 1964.)

AFFIRMING

The appellants are resident freeholders in an area of some 350 acres proposed to be annexed by the City of Erlanger, a third-class city. They have undertaken to appeal from a judgment of the circuit court, in a remonstrance suit, upholding the annexation.

The statute governing annexation by third-class cities, KRS 81.190 (4), provides that there shall be no appeal from the judgment of the circuit court in a remonstrance suit. There is a similar denial of an appeal in the statute relating to annexation by fifth-class cities, KRS 81.230 (3), but an appeal is permitted by the statutes applicable to cities of the first, second, fourth and sixth classes.

The appellants maintain that the statutory denial of an appeal in third-class city cases is unconstitutional as discriminatory, special legislation. A similar contention was made, and rejected, in Yount v. City of Frankfort, Ky., 255 S.W. 2d 632, wherein the court cited Lenox Land Co. v. City of Oakdale, 137 Ky. 484, 125 S.W. 1089, as authority for the proposition that the legislature constitutionally may provide different methods of annexation for different classes of cities.

We believe the holding in the Frankfort case is sound. Under Section 156 of the Kentucky Constitution cities may be divided into classes for the purposes of *organization and government*. Acts relating to organization and government of cities may distinguish between cities according to class without violating constitutional prohibitions against special legislation. Mannini v. McFarland, 294 Ky. 837, 172 S.W. 2d 631. Annexation is a matter of organization and government of cities. Lenox Land Co. vs. City of Oakdale, 137 Ky. 484, 125 S.W. 1089.

The appellants argue that even if they have no statutory right of appeal they nevertheless are entitled to an appellate review of the constitutional question of whether the annexation constitutes a taking of property without due process of law and without compensation. See Chesapeake & Ohio Railway Company v. Murphy, 314 Ky. 309, 234 S.W. 2d 969. The appellants say that the annexed area includes two farm tracts, one of 60 acres and the other of 40 acres, and a two-acre orchard tract, none of which is adaptable for municipal uses. The appellants contend that the taking of these tracts is unconstitutional under the ruling in Chesapeake & Ohio Railway Company v. City of Silver Grove, Ky., 249 S.W. 2d 520.

It is doubtful whether these appellants are entitled to raise the constitutional question, because they do not own

any of the three tracts claimed to be incapable of municipal use. However, the claim of unconstitutionality cannot in any event be sustained, because the evidence does not show that the three tracts are incapable of or inadaptable for municipal uses or purposes, within the meaning of the Silver Grove case, but only that the tracts are not presently being devoted to urban use.

We have accepted the appeal only for the purpose of passing on the constitutional questions raised. The question of whether the city adequately sustained its burden of proof is not reviewable.

The judgment is affirmed.

Judge Montgomery dissenting.

APPENDIX C

COURT OF APPEALS OF KENTUCKY

ROBERT J. JOBE, ET AL.,
Appellants,

vs.

CITY OF ERLANGER,
Appellee.

Appeal From Kenton Circuit Court
Common Law and Equity Division
Honorable Rodney G. Bryson, Judge

DISSENTING OPINION BY JUDGE MONTGOMERY

(Rendered May 8, 1964.)

The majority opinion rejects the argument of unconstitutionality on authority of Yount v. City of Frankfort, Ky., 255 S.W. 2d 632. In that case the statute authorizing a third-class city to annex certain territory was held not to violate the due process clause of the Federal Constitution.

This is no answer to my objection that the statutory denial of an appeal in third-class city annexation cases is a denial of the equal protection of the law to appellants in violation of the equal protection clause of the Federal Constitution. The concept of equal protection of the laws stems from the American ideal of fairness. Equal protection to all is the basic principle on which rests justice under the law. The clause in the Federal Constitution forbidding the states to deny equal protection of the laws guarantees the treatment alike in the same place and under like circumstances and conditions of all persons subjected to state

legislation. The Fourteenth Amendment of the United States Constitution expressly forbids a state to deny any person within its jurisdiction equal protection of the laws. It is a guaranty that all persons subjected to state legislation shall be treated alike, under like circumstances and conditions, both in privileges conferred and in liabilities imposed. 16A C.J.S., Constitutional Law, Section 502, pages 296 and 297.

As is pointed out in the majority opinion, KRS 81.190 (4) expressly provides that there shall be no appeal from the judgment of the circuit court in annexation proceedings involving third-class cities. It is further pointed out that there is a similar denial of an appeal in the statute relating to annexation by fifth-class cities. Appeals are permitted in similar cases involving cities of the other four classes.

There is no valid basis for saying that appeals shall be permitted in second and fourth-class city annexation cases and that an appeal shall be denied in a third-class city. Cities are classified on the sole basis of population. Kentucky Constitution, Section 156. Express provision therein is made for the change of classification of a city as its population may increase or decrease. Such differences in population cannot be made the basis for denying the freeholders of territory contiguous to a city the right to appeal in an annexation proceeding. There is no reasonable relationship between population and appeals. There is no difference in circumstance or condition between freeholders of territory contiguous to second, third, and fourth-class cities, except the difference in population of the respective cities. It is possible that the population may be the same or substantially so in cities of different classes.

The inevitable conclusion is that the statute which denies an appeal in this case is a denial of the equal protection of the law under the Federal Constitution.

Accordingly, I respectfully dissent.

APPENDIX D

In the

COURT OF APPEALS OF KENTUCKY

No. V-66-62

ROBERT J. JOBE and WILLIAM B. FARNEY,
Appellants,

vs.

CITY OF ERLANGER,
Appellee.

BRIEF FOR APPELLANTS

STATEMENT OF FACTS

This is an Appeal from a decision of the Kenton Circuit Court upholding and approving the annexation by the City of Erlanger, Kentucky, a municipal corporation of the third class, of an area lying to the southeast of the present city limits. A proposed annexation was undertaken by the city in May, 1959 and within the time prescribed by statute, Appellants filed a suit in remonstrance against said proposed annexation. By stipulation, counsel for respective parties agreed that the ordinance proposing annexation was legally and properly enacted; that 75% or more of the freeholders of the area proposed to be annexed were opposed to said annexation; and that the

issues to be determined were the constitutionality of the statute under which annexation was undertaken; to-wit, Kentucky Revised Statute 81.190; and whether defeat of annexation would materially retard the prosperity of the City of Erlanger and would further materially retard the prosperity of the owners and inhabitants of the proposed area.

Pursuant to the terms of the annexation statutes, more than 75% of the freeholders having objected to annexation, the city bore the burden of proof relative to all questions of fact and initiated the testimony. At the conclusion of the city's evidence, Appellants moved for a Directed Verdict, declaring the annexation to be null and void and of no force and effect, which motion was overruled and at the conclusion of all the evidence by all parties hereto, the matter was taken under submission by the Court and after submission of briefs by respective counsel and on March 29, 1962, Hon. Rodney G. Bryson, Judge, Kenton Circuit Court, Common Law & Equity Division, entered judgment approving annexation and dismissing Appellants' Complaint.

ARGUMENT

A. The statute under which the City of Erlanger proceeded to annex the invloved area is unconstitutional.

As will be seen from the record of these proceedings, Appellants raised a constitutional objection to annexation, pursuant to KRS 81.190(4), to-wit:

"There shall be no appeal from the judgment."

It is contended by Appellee that the Kentucky Court of Appeals has previously ruled on the constitutionality of said statute, most recently in the case of: *Yount* v. *City of Frankfort,* 255 SW(2d) 632.

As seen from that and earlier cases, our Court of Appeals, it is true, has consistently ruled that denial of the right of appeal, of itself, does not render a statute unconstitutional. This fact, Appellants concede; however, this is not the basis for the objection.

This statute (KRS 81.190) is unconstitutional, since it denies the right of appeal, whereas annexation statutes affecting other classes of cities do not deny the right of appeal and therefore, such differentiation and classification is discriminatory, special legislation, and thus, unconstitutional.

City of Louisville v. *Klusmeyer,* 324 SW(2d) 831 (1959):

> "The question often arises, as it does here, whether legislation made applicable to only one class of city and not to the others comes within the bar of local or special laws defined by Sec. 59 (Kentucky Constitution).
>
> "The term 'local act' means, at least in part, a law confined to territorial limits other than that of the whole state or a law applicable to some political subdivisions and not to others. The term 'special law' is legislation which arbitrarily or beyond reasonable justification discriminates against some person or objects and favors others. King v. Commonwealth, 194 Ky. 143, 238 SW 373, 22 ALR 535. Both are prohibited not only by Sec. 59 of our Constitution but by the guarantees of equal protection of the Fourteenth Amendment of the Federal Constitution and Sec. 3 of the Kentucky Constitution. Markendorf v. Friedman, 280 Ky. 484, 133 SW(2d) 516, 127 ALR 416, 309 U.S. 627, 60 S. Ct. 610, 84 L. Ed. 987."

It is seen that the right of appeal, in annexation matters, has the following unreasonable, illogical and discriminatory pattern:

a). First Class Cities – Right of Appeal.
b). Second Class Cities – Right of Appeal.
c). Third Class Cities – *Appeal denied.*
d). Fourth Class Cities – Right of Appeal.
e). Fifth Class Cities – *Appeal Denied.*
f). Sixth Class Cities – Right of Appeal.

Appellants urge it is no answer to the question to say, as was said in *Yount* v. *City of Frankfort* (*supra*), that the constitutionality of said statute has been upheld so often that it cannot any longer by seriously challenged.

First of all, unconstitutionality on the basis of Secs. 59 and 3 of the Kentucky Constitution and of the Fourteenth Amendment of the Federal Constitution, were not, it appears, raised on this particular issue, in the cited case and in earlier cases, but only the fact of denial of appeal, of and in itself.

Secondly, KRS 81-190 is unconstitutional for the reasons stated, whether or not these issues have been raised previously or not. No one could logically say that there is any reasonable basis existing for legislatively treating third and fifth class cities different not only from cities superior in size and importance and also different from cities inferior to it.

Nor do Appellants consider it any answer to the constitutional objection to state that nonetheless the Court of Appeals is, in fact, in this instance, hearing the Appeal, for this was done not only in *Yount* v. *City of Frankfort* (*supra*) but also in *Engle* v. *Miller*, 303 Ky. 731, 199 SW (2d) 123; in which cases, the Court of Appeals declined to review the questions of fact, on the basis of the statutory

denial of the right of appeal. It is denial of the right of appeal as to the questions of fact which is denied to some classes of cities and granted to others, which is the discriminatory character of this unconstitutional statute.

B. Annexation of the area herein involved is unconstitutional as amounting to a taking of private property without due process of law as prohibited by the Federal Constitution and also by Secs. 13 and 2 of the Constitution of Kentucky.

C & O Ry. Co. v. *City of Silver Grove,* 249 SW(2d) 520:

> "A statute providing for incorporation of cities does not authorize incorporation into a city of property incapable of any municipal use."

Stephens v. *Felton,* 99 Ky. 395, 35 SW 1116:

> "It would have been impracticable and oppressive to incorporate the proposed town, since a very large part of it was used for farming purposes."

Albershart v. *Donaldson,* 149 Ky. 510, 149 SW 875.

> "The boundary should not be established so as to embrace within it land which may not be urban property in any sense of the word."

Russell v. *Ironton-Russel Bridge Co.,* 249 Ky. 307, 60 SW(2d) 628:

> "Property may not be included within the corporate limits of a city if it is not adapted and can never be utilized for some municipal purpose."

The proposed area, consisting of approximately 350 acres, contains a 60 acre tract owned by James E. Mullins, which is devoted exclusively to the raising of hogs and other livestock.

There is a 40 acre tract owned by Alfred Hesselman, which the testimony shows, is used for agricultural purposes and the raising of livestock.

There is a vacant lot of approximately one and one-half acres, made up entirely of fruit trees. The same can be said, in general, of the 59 acre tract owned by David Ringo.

C. The judgment sustaining annexation is based on Findings of Fact, which are contrary to the evidence.

(1). The Court found that the area proposed to be annexed is the only remaining territory subject to potential development; that the area to the north of the city was not adaptable to annexation.

To the contrary, the evidence is as follows:

Transcript of Evidence (Page 13)

> "Q. I will ask you (Mr. Viox, City Engineer) whether, in your opinion, the area I have indicated, that being the area from the Boone County line running this way, would be available to the City of Erlanger for proposed annexation?
> A. Yes, it is available to the city."

Transcript of Evidence (page 64)

> "Q. You have approximately 260 to 270 residential lots in the present area of Erlanger not yet developed?
> A. (Clyde Rouse, City Coordinator) I think that is a fair estimate."

(2). The Court found that most of the utilities and improvements available in the area proposed to be annexed, were the direct result of the efforts of the Appellee; that the sanitary sewer line which crosses this area, is the result of the contract entered into between the City of Erlanger and the Sanitation District; that the expenses in-

curred in the construction of this line were borne in part by the residents of the City of Erlanger.

The testimony in this case, particularly that furnished by the city's witnesses is directly opposite to each and everyone of such alleged findings of fact. In addition, are we to presume that the city has expended funds illegally outside their corporate boundaries; and that the city has presumed to make agreements for an area outside its city limits?

(3). The Court found that the Stephenson Road water main is the result of negotiations between the city and the Kenton County Water Commission and the construction of the main along Turkeyfoot Road was favorably influenced by these negotiations.

Again, the testimony in this case is directly opposite to each and everyone of such alleged findings of fact. Neither the city nor the Kenton County Water Commission would have legal authority to make any agreement as was inferred in this "Finding of Fact," with respect to any area not then a part of the city.

(4). The Court finds that the county or city zoning to be enjoyed by the inhabitants of this territory, will be the direct result of the present zoning regulations of the city to which this territory is contiguous.

Counsel for Appellants is at a loss even to understand the meaning of this statement, much less to consider how this can have any bearing on the decision, one way or the other.

(5). The Court finds that the City of Erlanger is a prosperous and progressive third class municipality.

Appellants urge there is little evidence to support this statement, particularly when we consider that the present residents of this city, are to the present day, paying a double sanitation bill, in order to retire a defaulted bond issue existing since the early 1930s.

On the other hand, this unsupported statement if taken as true, rather militates against the proposition that failure to annex will materially retard the prosperity of the city.

D. Appellee bears the burden of proof and has not gone forward with sufficient evidence to sustain the findings herein.

As stipulated by counsel for respective parties, more than 75% of the freeholders in the area proposed to be annexed, object to said annexation. Pursuant therefore to KRS 81.110 and 81.190, the city bears the burden of proving:

a). That failure to annex will materially retard the prosperity of the city.

b). That failure to annex will materially retard the prosperity of the owners and inhabitants of the area sought to be annexed.

Relative to the city's prosperity, counsel for Appellants has searched the record of this case in an effort to locate some testimony relative to this point, to no avail.

Yes, there is testimony to the effect that the city has only about 270 more houses to build. Does this, standing alone, give any indication of retarded prosperity? Does the city rather mean to imply that its only real interest in annexation is to increase its tax duplicate? In truth, when all is said and done, this is the one and only reason that any city ever has undertaken, or will in the future, undertake annexation.

If increased tax revenue is sufficient reason, by itself, to sustain a finding that the city's prosperity will be "materially retarded" by defeat of annexation, the statutes further require, where more than 75% of the freeholders have protested, that the city must further bear the burden of proving that defeat of annexation will likewise materially

retard the prosperity of the owners and inhabitants of the area sought to be annexed.

Such a proposition is ridiculous and tantamount to stating that if the inhabitants will only let the City of Erlanger go ahead, why, the city is going to make each of them, individually, a lot richer.

But then, what does the city propose to "give" to these residents?

1). Water lines — These the residents already have available.
2). Sanitary lines — These the residents already have available.
3). Police Protection — This is already made available by the Kenton County Police, which has more men, more vehicles, more equipment.
4). Fire Protection — This is already available to the residents through the Southern Hills Voluntary Fire Department, to whom the area has been assigned by the State Actuarial Bureau.
5). Electricity — This the residents already have.
6). Roads — These are now provided by the State and County and properly maintained.

Relative to the lengthy discussion about fire protection, it is seen that upon completion of the new fire house being built by Southern Hills Fire Department, it will be closer to the proposed area than either the present Erlanger fire house or the one now under construction on Commonwealth Avenue. As a result of the new fire house and its proximity, the Appellants will acquire Seventh Class fire insurance.

On the other hand, the distance from the present Erlanger fire house or the one under construction on Commonwealth Avenue, would place these same residents in

a Ninth or Tenth class insurance rate, or so the testimony of the witnesses would indicate.

In any event, annexation has absolutely nothing to do with fire rates; rather, distance from the fire house, quantity and quality of equipment, and accessability of water mains are determinative.

While there was testimony to the effect that the city *might* even build a third fire house, or that the idea had been *considered* or even *proposed,* though no plans or specifications have been considered, Appellants urge that the city fell far short of proving that it ever intends to follow through with such plans. In any event, such extraordinary efforts on the part of a city of 7,000 people, considered together with the anticipated costs of its new city building, the operation of two other fire departments, its defaulted and antiquated bond issue, its history of periodically and repeatedly raising taxes, its creation of a $7200.00 job for a City Coordinator, absent statutory authority, and other matters, lead Appellants readily to their firm conviction that annexation of their homes can hardly be expected to result in an increment to their personal financial prosperity.

In any event, it cannot be said, in view of opposition by more than 75% of the freeholders of the area proposed to be annexed, that the City of Erlanger has sustained the burden of proving that defeat of annexation will materially retard the prosperity of the owners and inhabitants of the area to be annexed.

While the legislature has seen fit to require more than a majority of residents to defeat annexation, requiring instead, 75% thereof, it seems clear that the legislative intent, at least in general, is to the effect that annexation shall be defeated in the face of such numerical superiority, unless the factors mentioned above have been conclusively shown to amount to a virtual end or ruination of the City of

Erlanger unless annexation is approved. The record of this case presents no such case; it presents merely an opportunity for the city to increase its tax revenue, without any showing of corresponding benefit to the proposed residents.

As stated in the case of *City of Cold Spring* v. *John Laycock,* 312 SW(2d) 882:

> "While taxation as such is not a ground for denying annexation, it may be considered as one of the burdens for which the property owner would receive no adequate return."

It seems self-evident that that rule of law should be applied with even special emphasis, when such taxation evidently will be accompanied by no end of assessments, particularly assessments for facilities which are now available and accessible to the residents to be installed as each sees fit, at his own time and leisure.

While the annexing authorities would have us believe that they will save all mankind from themselves by providing for its every need, there will always exist individuals like James C. Beers, who testified in this matter, who chose cistern water over city water, his own state approved septic tank to city sewers, bottle gas to city gas, rural living to urban existence. And while the writer, himself, has chosen to the contrary in every respect and is himself a resident of the City of Erlanger, I am not convinced that the Court of Appeals will enforce such regulations on unwilling victims, absent a clear and preponderent showing of need and desirability. As is made clear in our every day living, it would be an unfortunate occurrence if everyone returned to the farm; on the other hand, we have seen clear examples, and will in the future see even more startling examples of the mistake of converting all of our land to housing development and all of our residents to city dwellers. It is a strange law, indeed, which uncon-

trollably would uproot the resident who has abandoned the city for his own good reasons, and thrust him immediately back into the same situation which he has made every effort to escape. As a result of these and similar efforts on the part of over-ambitious cities in Kenton County it has now become virtually impossible to remain in an unincorporated area and the writer is at a loss to discern any good reason why such stringent measures should be permitted to prevail.

The matter of annexation has been described in previous decisions to be a matter not so much of a legal question, but of a political question. As such, this "political" question, as all political questions, should be decided in large measure by a vote of the people. The involved residents have, in this instance, voted overwhelmingly to be relieved of the clutches of the City of Erlanger. This choice, under the facts of this case, should prevail.

CONCLUSION

The statute under which annexation is hereunder proposed, KRS 81.190, is unconstitutional as an act of only local and special application and as such, discriminatory, void and unconstitutional.

Furthermore, the City of Erlanger, having the burden of proving that defeat of annexation would not only materially retard its own prosperity, but that of the owners and inhabitants of the proposed area, as well, has failed in every respect to sustain the burden of proof.

Respectfully submitted,

James A. Nolan

JAMES A. NOLAN for
WARE, BRYSON & NOLAN
Attorneys for Appellants
507 First Natl. Bank Bldg.,
Covington, Kentucky

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In the

SUPREME COURT OF THE UNITED STATES

October Term 1965

No. [redacted] 62

ROBERT J. JOBE and WILLIAM B. FARNEY,
Appellants,

vs.

CITY OF ERLANGER,
Appellee.

MOTION TO DISMISS

HARRY L. RIGGS, JR., for
RIGGS AND RIGGS
Attorneys for Appellee
25 Erlanger Road
Erlanger, Kentucky

Copy of this MOTION TO DISMISS was served upon James C. Ware, Attorney for Appellants, 507 First National Bank Building, Covington, Kentucky, this 27th day of May, 1965.

Harry L. Riggs Jr.

HARRY L. RIGGS, JR.
Of Counsel for Appellee

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In the

Supreme Court of the United States

October Term 1964

ROBERT J. JOBE and WILLIAM B. FARNEY,
Appellants,

vs.

CITY OF ERLANGER,
Appellee.

MOTION TO DISMISS

Appellee in the above-titled case moves to dismiss this appeal on the grounds that the question presented is so unsubstantial as to not need further argument.

JURISDICTION

The jurisdiction of this Court which is sought to be invoked by the appellants is based upon 28 U.S.C. Section No. 1257 (2). The appellants herein are opponent to the annexation granted this appellee by the Second Division of the Kenton Circuit Court, Commonwealth of Kentucky. The appellants in their JURISDICTIONAL STATEMENT go to great length to deleniate the jurisdiction of this Court. If such jurisdiction exists, it is predicated upon whether the denial of the right of appeal of cities of the third and fifth class, where such right of appeals is granted cities of the first, second, fourth and sixth class, violates the Fourteenth Amendment of the United States

Constitution which expressly forbids a state to deny to any person within this jurisdiction equal protection of the laws. The answer to this question was long ago laid to rest by this Court in 1885. The equal protection clause does not require an appeal in a particular type of proceeding if all persons within a class are treated alike although an appeal may be allowed to persons differently situated. In the case of *Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky,* 115 U.S. 321, 29 L. ed 414, 6 S. Ct. 57, this Court was called upon to decide the constitutionality of a special tax by the Commonwealth of Kentucky upon railroads. After first passing upon other matters and at the end of the opinion, the Court stated:

> "We have already decided that the mode of valuing railroad property for taxation under this statute is due process of law. That being so, the provision securing the equal protection of the laws, does not require, in any case, an appeal, although it may be allowed in respect to other persons, differently situated. This was expressly decided by this Court in the case of *Missouri* v. *Louis,* 101 U.S. 22, 30. It was there said by Mr. Justice Bradley, delivering the opinion of the Court and speaking to this point, that, 'The last restriction, as to equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject matter, amount, or finality of decision, if all persons within the territorial limits of the irrespective jurisdictions have an equal right, in like cases, and under like circumstances, to resort to them for redress'. The right to classify railroad property as a separate class for purposes of taxation grows out of the inherent nature of the property and the discretion vest by the constitution of the state in the legislature, and necessarily involve the right, on its part, to divest and carry into effect a distinct scheme, with different tribunals, in the proceedings to valuate."

Inasmuch as this particular point has been decided by this Court and not changed or modified by subsequent decision, the matter deserves no further consideration.

ARGUMENT

Appellants, in their JURISDICTIONAL STATEMENT places persons located within any of the first six classes of cities as classified by the legislature of the Commonwealth of Kentucky in one class. They attempt to infer that members within that one class are differently treated regarding right of appeals from annexation. Appellants here overlook the fact that the Court is dealing with six different classes of persons of which these appellants are only one particular class.

As long as the law operates alike on all members in the class, which includes all persons and property similarly situated, it is not subject to any objection that it is special or class legislation, and is not in violation of the federal guarantee of the equal protection of laws. See *Great Atlantic & P. Tea Co.* v. *Grosjean,* 201 U.S. 412, 81 L. ed. 1193, 57 S. Ct. 772, 112 A.L.R. 293; *Phelps* v. *Board of Education,* 300 U.S. 319, 81 L. ed. 674, 57 S. Ct. 483; *Henderson Co.* v. *Thompson,* 300 U.S. 258, 81 L. ed. 632, 57 S. Ct. 447; *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.,* 299 U.S. 183, 81 L. ed. 109, 57 S. Ct. 139, 106 A.L.R. 1476; *Young* v *Masci,* 289 U.S. 253, 77 L. ed. 1158, 53 S. Ct. 599, 88 A.L.R. 170.

In addition, the validity of a statute is not effected by the fact that the legislation is based on a classification and is made to apply only to certain limited groups of persons and not to others, if it is so designed that all persons subject to its provisions are treated alike under similar conditions and circumstances. See *New York ex rel. Bryant* v. *Zimmerman,* 278 U.S. 63, 73 L. ed. 184, 49 S. Ct. 61, 62 A.L.R.

785; *Jones* v. *Brim,* 165 U.S. 180, 41 L. ed. 677, 17 S. Ct. 282, affg. 11 Utah 200, 39 P. 825; *McPherson* v. *Blacker,* 146 U.S. 1, 36 L. ed. 869, 13 S. Ct. 3; *Walston* v. *Nevin,* 128 U.S. 578.

No attempt is made to infer that residents of third class cities received different treatment in their right of appeal from annexation proceedings. No attempt is made to show that the classification of third class cities is so unreasonable as to be discriminatory.

CONCLUSION

Based upon the case of *Cincinnati NO & T P R I Co.* v. *Commonwealth of Kentucky, supra* and upon the foregoing arguments it is respectfully submitted that the appeal should be dismissed as the question presented is so unsubstantial as to not need further argument.

Respectfully submitted,

HARRY L. RIGGS, JR.
Counsel for Appellee

APPENDIX A

In The
COURT OF APPEALS OF KENTUCKY

No. V-66-62

ROBERT J. JOBE and WILLIAM B. EARNEY,
Appellants,

vs.

CITY OF ERLANGER,
Appellee.

BRIEF FOR APPELLEE

STATEMENT OF FACTS

MAY IT PLEASE THE COURT:

This is an Appeal from the decision of the Kenton Circuit Court approving the annexation to the City of Erlanger of certain unincorporated territory lying to the southeast of the present corporate limits. While the Appellees find no discrepancies or inaccuracies in the Appellants' brief statement of fact, we wish to call to the attention of this honorable court that certain stipulations were entered into between the parties, number two of which provides as follows:

(2) That Ordinance No. 1026 (ordinance proposing annexation) of the City of Erlanger, adopted May 5, 1959, was properly passed and published according to the applicable provisions of the Kentucky Revised Statutes and no objection is made thereto by the Plaintiff.

ARGUMENT

A. THE STATUTES UNDER WHICH THE CITY OF ERLANGER PROCEEDED TO ANNEX THE TERRITORY INVOLVED IS CONSTITUTIONAL, AND IT IS NOT A TAKING OF PRIVATE PROPERTY WITHOUT DUE PROCESS OF LAW OR PROHIBITED BY THE FEDERAL CONSTITUTION AND SECTIONS 13 AND 2 OF THE CONSTITUTION OF KENTUCKY.

Appellant's brief seeks to revive an issue which has long since been laid to rest by numerous decisions of this court. Appellants contend that KRS 81.190 is unconstitutional for the reasons that there is a denial of the right of appeal and inasmuch as the right of appeal is granted in annexation matters to certain classes of cities and denied to others, this section amounts to special legislation which is discriminatory in its classification.

The question of the constitutionality in denying the right of appeal was settled in the recent case of *Yount* v. *City of Frankfort,* 255 S.W. 2d 632.

In this case the constitutionality of KRS 81.190 was challenged as it applies to the attempted annexation by the City of Frankfort, then a city of the third class. In upholding the constitutionality of this section the court stated as follows:

> "Furthermore, they cannot complain of the ruling of the court denying them default judgment since KRS 81.190(4) provides there shall be no appeal from the judgment of the circuit court in annexation proceedings by a third class city. *The power of the Legislature to deny the right of appeal has always been recognized.* Section 110 Ky. Constitution; Mason v. Montgomery County Board of Education, 291 Ky. 654, 165 S.W. 2d 346. However, we have

written that where in the same case the constitutionality of an Act of the Legislature is raised, which is independent in its nature, strictly judicial and one of great consequence, it would be considered on appeal. Engle v. Miller, 303 Ky. 731, 199 S.W. 2d 123. While we cannot consider the merits of this case on appeal, we can determine whether or not the ordinance proposing annexation was duly passed, as well as the constitutionality of KRS 81.190." (Italics added.)

Appellant also attacks KRS 81.190 on the grounds that it is special legislation and that the proposed annexation amounts to a taking of private property in violation of the Federal Constitution and the Constitution of Kentucky. Again Appellees respectively direct the court's attention to the case of *Yount* v. *City of Frankfort*, (*supra*).

"Appellants' next contention that KRS 81.190 violates Kentucky Constitution Paragraph 2 (absolute and arbitrary power over life and property does not exist), Paragraph 59 (forbidding special legislation), and Paragraph 1 of the Fourteenth Amendment to the Federal Constitution (due process clause), is so conclusively answered in Lewis v. Brandenburg, 105 Ky. 14, 47 S.W. 862, 48 S.W. 978, on petition for rehearing, and Lenox Land Co. v. City of Oakdale, 137 Ky. 484, 125 S.W. 1089, 127 S.W. 538, on petition for rehearing, that we do not deem it necessary in this opinion to restate the law. It will suffice to lift this one except from Page 1091 of 125 S.W. in the Oakdale opinion:

'But it has been repeatedly announced, by this court and others, that the question of due process of law or taking of property without compensation has no application to the annexation of territory to a municipality. The extension or reduction of the boundaries of a city or town is held, without exception, to be purely a political matter, entirely within the power of the Legislature of the state to

> *regulate*. The established doctrine is that the state Legislature has the unlimited right to pass such laws for the annexation of territory to municipal corporations as in its judgment will best accomplish the desired end, and that a different method may be provided for each class.' " (Italics added.)

This court has long recognized the fact that the creation or incorporation of a municipality including the extension or reduction of its boundaries is a political act and legislative function. In these cases the trial court merely declares the action of the legislature to be operative. In the case of *Engle et al* v. *Miller,* 303 Ky. 731, 199 S.W. 2d 123 the court recognized the right of the legislature to deny an appeal. In this case the court was construing KRS 81.060 which provides for the establishment of cities. While that particular section and the one under attack in this case are different, both sections are purely political matters and entirely within the power of the legislature of the Commonwealth of Kentucky to regulate. In that case the court stated:

> "Therefore, the denial of the right of appeal contained in KRS 81.060 (which is the same as before the amendment of 1946) must be construed as having particular or special reference to the subject matter of the section of the statute of which it is a part, namely, that relating to proceedings and judgments establishing a city. *The action of the circuit court in that matter is not strictly judicial, for the creation or incorporation of a municipality is a political act and legislative function. The General Assembly has set up the conditions for the establishment of a city or town and conferred the power upon the court to determine whether certain facts exist.* That is the limit of judicial action. When the specified conditions are found to exist, there is no further judicial discretion in the court. The court, in effect, merely de-

clares the act of the Legislature to be operative. Jernigan v. City of Madisonville, 102 Ky. 313, 43 S.W. 448, 39 L.R.A. 214; Carrithers v. City of Shelbyville, 126 Ky. 769, 104 S.W. 744, 17 L.R.A. N.S., 421, 31 Ky. Law Rep. 1166; Boone County v. Town of Verona, 190 Ky. 430, 227 S.W. 804. It is to this that the provision with respect to denying an appeal relates." (Italics added.)

From the foregoing, Appellee respectfully submits that KRS 81.190 is neither unconstitutional in its denial of the right of appeal, nor is it unconstitutional for the reason that it violates the Federal Constitution and the Constitution of the Commonwealth of Kentucky.

B. THE JUDGMENT OF THE COURT SUSTAINING ANNEXATION IS AMPLY SUPPORTED BY THE EVIDENCE.

The Appellants go to great length in attempting to show that each of the findings of the court are contrary to the evidence. No attempt will be made here to go into unnecessary detail to substantiate the court's findings of fact. However, a few of the more prominent items will be noted.

Appellants attempt to point out that the City of Erlanger has additional area available to it for expansion and annexation. Certain statements of Mr. James Viox, City Engineer, are noted in the Appellants' brief. Appellants failed to read further where these statements are clarified.

On Re-direct Examination, Transcript of Evidence, (Page 19):

"Q. You pointed out to Mr. Nolan certain area on the northeast city limits which was susceptible to annexation. This area here?

A. That's right.

Q. Will you tell the court exactly what type of terrain, general development, and improvements are now in this area, if you know?

A. In my opinion, that is not desirable to be annexed on account of its terrain. It is very rough. It makes this place look like a prairie by comparison."

Appellants attempted to show that the water main on Turkeyfoot Road was not the result of negotiations between the City and the Kenton County Water Commission. The evidence on this point is clear and uncontradicted. Attention is directed to Pages 6, 7, and 8 of the Transcript of Evidence but more particularly to the following testimony by Mr. James Viox, City Engineer, on Page 7:

"Q. Will you tell us, if you know, who laid the water line which joins the water line on Turkeyfoot coming up Stephenson Road in the City of Erlanger.

A. The Kenton County Water District paid for this section from Turkeyfoot back to the City limits. The City of Erlanger paid for practically all the other. They paid for two inches extra because they wanted an eight inch line back rather than the six inch which is what the City needed.

Q. At whose request was the line from Turkeyfoot Road to Stephenson Road laid?

A. At the City's instigation. The City of Erlanger requested it. In fact, they were practically entirely instrumental in getting it there.

Q. Do you know whether or not the City of Erlanger bore any of the connection of that line which joins Turkeyfoot Road and comes up Stephenson to the City of Erlanger?

A. No part as far as the County. The major portion after it gets to the City on up to the end of the existing main on Stephenson, was borne by the City of Erlanger. No part in the County was borne by the City. It was paid by the District."

Appellants again attempt to infer that the testimony of the city witnesses do not support the findings of the court, that the sanitary sewer line which crosses the area involved is a result of a contract entered into by the City of Erlanger and the Sanitation District and that part of the expenses incurred in the construction of this line were borne in part by the residents of the City of Erlanger.

The evidence more than sustains this finding. The entire testimony of Mr. Viox, City Engineer, is clear on all points. The sanitary sewer improvements in this area were clearly explained by Mr. Viox. In Transcript of Evidence. Pages 8 and 9:

"Q. Are you also familiar with the sanitary sewer improvements that have been made in the area proposed to be annexed that were borne by the City of Erlanger?

A. Yes. The City of Erlanger just a few months ago had an operational disposal plant almost at the end of the City Limits, within the City near to the end. After we joined the Sanitation District, they came out and put in a pumping station situated down here and built a trunk line that intercepted our plant, which runs through this section back in the creek area.

Q. It runs through to the section proposed to be annexed?

A. Yes, through the middle.

Q. Is it a gravity or pressure line?

A. Gravity.

Q. Am I correct in assuming it ties into the plant you just described?

A. The plant originally had was abandoned about one month or so ago and now runs through this—the plant has been cut out and runs down the trunk line the District built to connect its plant to the pump station and in turn is pumped back to the plant at Bromley.

Q. Are there any other sanitary sewer improvements in the area other than the line you just described constructed by the Sanitation District?

A. To my knowledge there is no sewers other than that in this area. In this area, I believe they have septic tanks or some sort of private disposal system."

Appellants apparently do not understand the cooperative effort that is made between the county and city zoning boards. On Page 30 of Transcript of Evidence, Mr. Austin Mann states that he is a member of the Kenton County Planning and Zoning Commission, whose function is the planning and zoning of unincorporated area outside the City of Covington. This commission has zoning jurisdiction over the unincorporated area proposed to be annexed by the City of Erlanger. The protection afforded the residents of the territory involved in this annexation proceeding is the direct result of the present zoning regulations of the City to which this territory is contiguous.

In Transcript of Evidence, Page 31, Mr. Mann states:

"Q. Do you know whether or not this Planning commission of which you are a member, has any authority over local planning and zoning commissions? By that I am referring to the City of Erlanger?

A. They do not have.

Q. Do the two organizations work together? I mean the Kenton Zoning Commission and the Zoning and Planning of the City of Erlanger?

A. To my knowledge attempts have been made to correlate efforts and plan together.

Q. Would they take into consideration when zoning an area outside the municipality, the type of zoning there is now in the city which abuts that area?

A. Yes, blend it."

Appellants attempt to ridicule the findings of the court that the City of Erlanger is a progressive and prosperous

third class municipality. This attack by the Appellants is completely unwarranted.

C. THE TESTIMONY SHOWS BEYOND A REASONABLE DOUBT THAT FAILURE TO ANNEX WILL MATERIALLY RETARD THE PROSPERITY OF THE CITY AS WELL AS THE PROSPERITY OF THE OWNERS AND INHABITANTS OF THE TERRITORY SOUGHT TO BE ANNEXED.

The law applicable to this situation has been enunciated by the Court of Appeals on numerous instances. The cases cited by the Defendant are those which interpret the statute where more than 75% of the inhabitants of the territory sought to be annexed have remonstrated. In the case of *Park et al* v. *City of Covington,* 187 Ky. 311, 218 S.W. 986, involved the annexation of certain territory in the City of Covington which runs along the north side of 26th Street between Rogers Street and Latonia Avenue. One-half of the street in question was in the City of Covington and the other half was not. In ordering the annexation, the Court said:

> "It was further shown that the improvement of Twenty-seventh Street, by the construction of a trunk sewer, the paving of the street with granite block, the construction of sidewalks, and the bringing of gas into that part of the City, would enhance the value of the property in that section, including the property in question, from 50 to 100 per cent. On the other hand, the failure to annex the territory, which would prevent these improvements from being made, would not only retard the enhancement in price of the property in question, but would retard the growth and prosperity of the city on the opposite side of the street, since that portion of the city could not be built up until the improvements were made. In addition

to this, it was shown that the inhabitants of the territory in question enjoy the same benefits and protection from the city government that the inhabitants on the opposite side of the street now enjoy.

In view of the foregoing evidence, we see no reason to disturb the finding of the chancellor. *In our opinion, the evidence makes it clear that, if the annexation does not take place, the inhabitants of the surrounding territory will be denied many governmental privileges which they would otherwise enjoy, and that this will deter others from locating in that vicinity, thereby postponing the development of the surrounding territory and the territory in question, preventing its enhancement in price, and thus necessarily retarding the prosperity not only of the city, but of the owners and inhabitants of the territory sought to be annexed."* (Italics added.)

The court was faced with a similar situation in the City of Louisville. The importance of this case was the fact that the court defined "to retard prosperity." In the case of *Loeffler* v. *City of Louisville,* 308 Ky. 629, 215 S.W. 2d 535, the court said:

> "To retard prosperity means to delay progress. *Webster's New International Dictionary.* The prosperity of a community must be gauged by its attainments in the many fields affecting the welfare of its inhabitants and the owners of property comprising its territorial limits. Thus economic, religious, social, educational, safety and sanitary conditions are factors to be taken into consideration in determining the prosperity of a community as a whole."

An additional case involving the same issues, is also to be noted. In the case of *S. S. Likins et al.* v. *City of Clarkson,* 280 S.W. 2d 491, the court stated:

> "The term 'retard prosperity' means to delay progress of the community as 'gauged by its attainments

> in the many fields affecting the welfare of its inhabitants and the owners of property comprising its territorial limits. Thus economic, religious, social, educational, safety, and sanitary conditions are factors to be taken into consideration in determining the prosperity of a community as a whole', Loeffler v. City of Louisville, 308 Ky. 629, 215 S.W. 2d 535, 536. In determining the question, the court views the situation as a whole — 'the City as an organized community and the suburban property as an unorganized community.' Masonic Widows and Orphans Home and Infirmary v. City of Louisville, 309 Ky. 532, 217 S.W. 2d 815, 819. It is apparent that each case of annexation is to be decided according to its own peculiar conditions and facts."

There can be no doubt that the City has introduced sufficient testimony to show that its prosperity would be retarded by failure to annex. Mr. Viox, City Engineer, in his testimony, part of which was referred to in earlier portions of this brief, has shown that the City is surrounded on all sides except two. One of these sides is not suitable for annexation at the present time by reason of the extremely rough condition of the terrain. The remaining territory which is suitable for annexation is the subject of this law suit.

Ample testimony was introduced to show that a majority of the utilities and improvements that are enjoyed by the inhabitants of this area are the direct result of the efforts of the City of Erlanger. The evidence further indicated that most of the expenses incurred in making these utilities available were borne by the residents of the City. The testimony shows that sanitary sewer service is in the immediate area and available for use by the residents of this territory. Mr. Viox explained that this sewer service was partly brought about by a contract entered into between the City

of Erlanger and Sanitation District No. 1 of Campbell and Kenton Counties.

Ample testimony has also been introduced to show that the water line which comes down Stevenson Road and is availabe to a portion of the residents of this area involved, was the direct result of negotiations between the City of Erlanger and the Kenton County Water Commission District No. 1. The territory in question is primarily residential in nature. This territory abuts a similar residential area in the City of Erlanger. One of the most important things to be afforded the residents of this area is zoning protection. The development of this territory as it now stands can certainly be traced to its proximity to a residential area in the City of Erlanger.

The testimony shows that the City is almost surrounded and that expansion and development will rapidly come to a standstill. The remaining area within the present corporate limits that is available for development is extremely small. Mr. Rouse, in his testimony clearly brought this problem to light.

Transcript of Evidence, Page 53:

"Q. In your capacity as City Co-ordinator, are you familiar with the types of residences, industries and business development and construction that is going on in the city limits of Erlanger?

A. I am.

Q. Can you tell the court whether or not the saturation point has been reached within the corporate limits of the City of Erlanger for additional development of industry, business and residential areas?

A. Mr. Riggs, the saturation point has nearly been reached.

Q. Can you go to the blackboard and show the Court the area now under development and tell what that problem is?

A. Most of the development as far as subdivision is concerned now is taking place in the City of Erlanger in the southeast portion of the section of the Gripshover tract. This area is being developed principally by three developers within the City, at the present time, together with a smaller subdivision in the area bounded by Mary Street, McArthur Street and Stephenson Road are the only two large plots of ground being developed within this area of the City. The area to the northwest of the City of Erlanger is being developed also. At the present time, there is approximately 70 to 75 acres that is being developed in that particular area on a gradual basis, that is, so many homes per year. The Boone County line curtails the development in that area. In this particular area (indicating) all the area has been developed with the exception of one small section known as the Silver Lake area which runs between Hulbert, Crescent Springs and Riggs Avenue. That block of approximately 20 acres has not been developed. The City of Erlanger has been growing at the rate of approximately 100 homes a year for the past six or seven years and with the exception of the growth in those areas I pointed out, there are practically no building lots available in any number in the City of Erlanger at the present time."

Not to be forgotten in this case and equally important, is the showing that has been made that the prosperity of the inhabitants of the territory to be annexed will be materially retarded if annexation does not take place. This point has been clearly shown again by the testimony of Mr. Clyde Rouse in establishing the facilities and services that will be made available to these people. The law applicable to this point has been clearly defined by this court in the cases of *Loeffler* v. *City of Louisville* (*Supra*) and *S. S. Likins et al* v. *City of Clarkson* (*Supra*). This court has

continuously held that economic and social, safety and sanitary conditions are factors to be taken into consideration in determining the prosperity of a community as a whole. Appellees do not wish to dwell on this point since we feel the evidence speaks for itself, and clearly sustains the findings made by the Kenton Circuit Court.

The testimony on fire protection indicated that a substantial reduction in insurance rates will result. While Appellants attempt to refute this, there is no contradiction of the testimony of G. F. Pettit, insurance agent, which begins on Page 67 of the Transcript of Evidence. The testimony shows on Pages 69 and 70 of the Transcript of Evidence that as much as a $34.50 savings would result on insurance rates for a brick house located in the City and enjoying a class six insurance rate. This savings would be even larger on a frame dwelling. Other valuable services to be made available to the resident of the territory sought to be annexed include street lighting programs, a reduction in electricity rates, improved winter road service and sanding, and increased police protection. Also of substantial importance is the increase in land values that would result from the benefit of being annexed to the City.

CONCLUSION

Many of the desirable features of living in this territory are truly attributable to its proximity to the City of Erlanger, but for which such features would not be available and it is fitting for the entire area to get the full benefit of all of the City's facilities.

The Appellee respectfully submits to the court that the evidence has clearly shown that failure to annex the territory will materially retard the prosperity of the City and of the owners and inhabitants of the territory to be annexed

and that this honorable court should sustain the judgment of the Kenton Circuit Court ordering annexation.

Respectfully submitted,

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HARRY L. RIGGS, JR. for
RIGGS & RIGGS
Attorneys for Appellee
25 Erlanger Road
Erlanger, Kentucky

APPENDIX B

(CAPTION OMITTED)

REPLY TO PETITION FOR REHEARING COURT OF APPEALS OF KENTUCKY

STATEMENT OF FACTS

May it please the Court:

The facts in this case have been thoroughly stated, and re-stated in the previous Briefs filed by Appellant and Appellee. It is necessary at this point, however, to state that the facts to be considered in this Petition for Rehearing now pending is that this Honorable Court, having previously rendered its decision affirming the Judgment of the Second Division of the Kenton Circuit Court has now been asked to reconsider this decision in light of the constitutionality of KRS 81.230 (3).

ARGUMENT

A. KRS 81.230 (3) IS NOT UNCONSTITUTIONAL IN THAT IT DENIES THE RIGHT OF APPEAL TO FREEHOLDERS ANNEXED BY CITIES OF THE THIRD AND FIFTH CLASS AND GRANTS THE RIGHT OF APPEAL TO FREEHOLDERS ANNEXED BY CITIES OF THE FIRST, SECOND, FOURTH AND SIXTH CLASS.

Appellee, in his petition for rehearing bases his entire position on the fact that the denial of the right of appeal is a violation not only of sections 3 and 59 of the Kentucky Constitution but also of the Fourteenth Amendment of the Constitution of the United States. The entire question therefore seems to turn upon whether or not such a denial as it applies to third and fifth class cities is so arbitrary and

discriminatory as to be unequal in its application and to deny equal protection of the laws.

This Honorable Court is rendering its decision in this case on May 8, 1964, thoroughly disposed of the problem when it stated:

> "The appellants maintain that the statutory denial of an appeal in third-class city cases is unconstitutional as discriminatory, special legislation. A similar contention was made, and rejected, in *Yount* v. *City of Frankfort, Ky.*, 255 S.W.2d 632, wherein the Court cited *Lenox Land Co.* v. *City of Oakdale,* 137 Ky. 484, 125 S.W. 1089, as authority for the proposition that the legislature constitutionally may provide different methods of annexation for different classes of cities.
>
> We believe the holding in the Frankfort case is sound. Under Section 156 of the Kentucky Constitution cities may be divided into classes for the purposes of *organization and government.* Acts relating to organization and government of cities may distinguish between cities according to class without violating constitutional prohibitions against special legislation. *Mannini* v. *McFarland,* 294 Ky. 837, 172 S.W.2d 631. Annexation is a matter of organization and government of cities. *Lenox Land Co.* v. *City of Oakdale,* 137 Ky. 484, 125 S.W. 1089."

It has long been settled by this Honorable Court as well as the Supreme Court of the United States that laws or local ordinances which apply equally to all members of a class are not unconstitutional where uniform in application to all persons in the same class and under similar conditions. It is stated in 12 American Jurisprudence, Constitutional Law, Section 478, as follows:

> "If a classification in legislation meets the prerequisites indispensable to the establishment of a class that it be reasonable and not arbitrary, and be based upon substantial distinctions with a proper relation to the

> objects classified and the purposes sought to be achieved, as long as the law operates alike on all members of the class which includes all persons and property similarly situated, it is not subject to any objections that it is special or class legislation, and is not a violation of the Federal guaranty as to the equal protection of the laws."

The rule seems to be that as long as all persons within the class are treated equally there is no violation of either the Kentucky nor the Federal Constitution. In the case of *Barker* v. *Curum*, 177 Ky. 637, 198 S.W. 211 the State Legislature enacted a statute providing financial assistance for certain students to enter the State University who not only passed an examination but were also privileged to be selected and grouped into another classification by the County Superintendent. In holding such a statute unconstitutional as it discriminated as to members within the class the Court stated:

> "It is true that the statute in question creates a class, but it does not treat all of that class alike; and its vice is found in that omission. If the statute had provided that all students of a certain age who pass the required examination should be entitled to enter the University upon equal terms and conditions as to the payment of fees and other expenses, it might be said that the statute was unobjectionable. But here there is no such provision, since the class is first selected under an examination, and from that class another class is selected by the county superintendent, and the fortunate students thus arbitrarily selected are given money from the state treasury, where others who have likewise passed the required examination are required to pay their fees and traveling expenses."

B. THE STATE LEGISLATURE HAS THE CONSTITUTIONAL AUTHORITY TO IMPOSE CERTAIN LIMITATIONS UPON THE RIGHT OF APPEAL.

The appellate jurisdiction of this Court as derived from the Constitution of this State can be exercised only within the limitations contained in the Constitution. It has long been recognized that the right of appeal is not absolute. In this case of *Engle, et al* v. *Miller,* 303 Ky. 731, 119 S.W.2d, 123, it was noted that the incorporation and creation of a municipality is purely a political act and legislative function. The general assembly has conferred upon the Courts the power to determine whether or not certain facts exist regarding an enlargement or reduction of municipal territory. In the case of *Lenox Land Co.* v. *City of Oakdale,* 137 Ky. 484, 125 S.W. 1089, 127 S.W. 538, it is stated:

> "It (the Legislature) might have made the action of the municipal authorities final, but, in the lawful exercise of its power, it saw proper to provide that in certain states of case dissatisfied property owners might resist the annexation of their property. As the matter of allowing an appeal to the Courts was wholly a question with the legislature, it had the right to attach such conditions as it pleased to this privilege."

The rule applicable to this case has been clearly stated in 12 American Jurisprudence, Constitutional Law, Section 554, where it is stated:

> "Moreover, the equal protection clause does not require an appeal in a particular type of proceeding or in some particular situation, if all persons within that

> class are treated alike, although an appeal may be allowed to persons differently situated."

In this connection see *Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky*, 115 U.S. 321, 29 L. ed 414, 6 S. Ct. 57; *Saylor* v. *Duel*, 236 Ill. 429, 86 N.E. 119, 19 L.R.A.(N.S.) 377. It can therefore be clearly seen that as long as the persons within the class are affected equally then the conditions of the equal protection clause have been met. It is also stated in 4 American Jurisprudence 2d, Appeal and Error, Section 6:

> "Except to the extent that Constitutional provisions impose limitations, the legislatures of the several states and of the Federal Government have authority to abridge or extend the right to an appeal at their discretion. Even the existence of a general constitutional right to appeal does not preclude reasonable legislative regulation and control of the right, and absent specific constitutional provisions, the legislature may ordinarily determine in what cases, under what circumstances, and from what courts, appeals may be taken."

CONCLUSION

In conclusion it is obvious that the provisions of KRS 81.230 (3) do not violate the equal protections clause of the Federal Constitution nor of the State Constitution. It is to be noted that all persons in the third or fifth class cities are equally situated. All of these persons within these two groups have the same rights regarding an appeal and none of them are discriminated against nor are they differently situated with regard to their particular right of appeal. While it is true that members of different class cities are granted the right of appeal, they are not within the same class as those from whom the right is withheld.

Appellee respectfully submits to the Court that the Appellant's Petition for Rehearing should be denied.

Respectfully submitted,

.....

HARRY L. RIGGS, JR., for
RIGGS & RIGGS,
Attorneys for Appellee,
25 Erlanger Road,
Erlanger, Kentucky.

END